UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

TROPICAL WELLNESS CENTER, LLC

And **Cases: 12-CA-167884**
12-CA-171371

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

Marinelly Maldonado, Esq.,
for the General Counsel.
Javier Almazan, Sr. (IAMAW), of
Loxahatchee, FL, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ELIZABETH M. TAFE, Administrative Law Judge. This case was tried in Rockledge, Florida on July 10, 2017 and in Miami, Florida on August 27, 2018. Following a motion by the General Counsel to rest his case, the trial was closed by written order issued on November 30, 2018.[1] The International Association of Machinists and Aerospace Workers,[2] AFL-CIO (Charging Party or Union) filed the charge in 12-CA-167884 on January 19, 2016, which was served the same day, and amended on March 22, 2016 and May 25, 2016.[3] The Charging Party filed the charge in 12-CA-171371 on March 9, 2016, which was served on March 10, 2016.[4] The General Counsel issued the consolidated complaint on June 30, 2016, and the amended consolidated complaint on August 23, 2016, and further amended the complaint on September 22 and 29, 2016 (the complaint).[5] The complaint alleges that Tropical Wellness Center, LLC (Respondent or TWC) violated Section 8(a)(5) and (1) by failing to continue in effect terms of the collective-bargaining agreement when TWC failed to remit union dues and pension funds to the Union without the Union's consent within the meaning of 8(d); by failing to bargain collectively upon request about grievances the Union filed regarding TWC's failure to remit these monies; and by failing to provide information requested by the Union that was reasonable

[1] The General Counsel's motion to rest was admitted as ALJ Exh. 1 by the November 30, 2018 order, which was admitted as ALJ Exh. 2. By this order, GC Exh. 23, a set of documents from Wells Fargo Bank attached to the motion, was also admitted. My review of the record reveals that GC Exh. 23 remains attached to ALJ Exh. 1. The record is hereby corrected to reflect that GC Exh. 23 is a separate exhibit.

[2] References to the Union include, collectively, three related entities or subdivisions: the charging party (the IAM or International Union), IAM District Lodge 166 (AFL-CIO), and IAM Local Lodge 971.

[3] GC Exh. 1(a), (b), (c), (g), (h), (i), (j), (k), and (l).

[4] GC Exh. 1(d), (e), and (f).

[5] GC Exh. 1(m), 1(r), (u) and (w).

and necessary for its role as collective-bargaining agent. The complaint also alleges that TWC violated Section 8(a)(3), (4) and (1) of the Act by laying off the entire unit of employees because the employees belonged to the Union and/or because the Union had filed charges with the Board. The Respondent timely filed answers to the initial consolidated complaint on July 14, 2016 and to the amended consolidated complaint on September 15, 2016.[6] The record does not contain Respondent's answers to the General Counsel's September 22 amendment to the complaint or his September 29, 2016 second amendment to the complaint; the factual allegations in these two duly served amendments to the complaint are, therefore, admitted.[7]

The parties were given a full opportunity to appear and participate in the hearing, to offer evidence, to call, examine and cross-examine witnesses, to make arguments, and to submit written briefs.[8] On the entire record, including my observation of the demeanor of the witnesses, and after considering the brief and supplemental brief filed by the General Counsel, I make the following findings, conclusions, and recommendations.[9]

FINDINGS OF FACT[10]

I. JURISDICTION

The Respondent, Tropical Wellness Center, LLC, is a limited liability company, with an office and place of business in Palm Bay Florida (Palm Bay facility) at which it engages in the business of providing drug and alcohol addiction treatment and rehabilitation services. The Respondent admits, and I find, that it annually purchased and received at its Palm Bay facility

[6] GC Exhs. 1(o) and (ff). The Respondent raised a number of affirmative defenses and general denials in its answers. In failing to participate in the hearing, the Respondent failed to present evidence in support of these defenses. I affirmatively find that the complaint allegations were based on timely filed charges in accord with Sec. 10(b) of the Act. I have considered but find insufficient evidence to support the asserted defenses. I note that this case was not litigated under theories of successorship or of withdrawal of recognition, nor has the Respondent raised those potential theories as defenses.

[7] GC Exhs.1 (v) and (x).

[8] The Respondent opted not to participate in the hearing after initially answering the complaint through legal counsel. Neither the Union nor the Respondent filed posthearing briefs or supplemental briefs. The Respondent failed to comply with the General Counsel's subpoenas, which were duly issued and served, despite being directed to do so by an October 3, 2016 order of Administrative Law Judge, Melissa M. Olivero; by an enforcement order of Hon. Robin L. Rosenberg, United States District Judge, District of Southern Florida, Case No. 2:17-MC-14276/Rosenberg/Maynard (December 19, 2017), and by my January 5, 2018 order. The hearing's schedule was significantly delayed by the Respondent's failure to comply with subpoenas, as the General Counsel sought subpoena enforcement in United States District Court and sought to obtain evidence through third parties. As reflected in the record, the Respondent's legal counsels of record twice withdrew from representation after the issuance of the complaint and before the close of the record. The Respondent proceeded without counsel, and ultimately it failed to participate.

[9] In response to my order inviting parties to file supplemental briefs in consideration of the Board's decision in *MV Transportation, Inc.*, 368 NLRB No. 66 (2019), the General Counsel moved to withdraw his complaint allegation that the Respondent violated Sec. 8(a)(5) by laying off employees without providing prior notice or opportunity to bargain. See GC Exh. 1(r) at para. 8(d), 8(e), and 12. I grant the General Counsel's unopposed motion to withdraw that allegation.

[10] Although I include citations in this decision to highlight testimony or exhibits in the evidentiary record, I emphasize that my findings and conclusions are not based solely on those specific citations, but rather are based on my review and consideration of the entire record for this case.

services valued in excess of $5000 directly from points outside of the State of Florida, and from other entities located outside the State of Florida, each of which other enterprises had received the services from points outside the State of Florida.

In its answers, the Respondent denied that it receives in excess of $250,000 in annual gross income.[11] The Board will assert discretionary jurisdiction over medical facilities, including rehabilitation and drug treatment programs, upon a showing of annual gross revenue in excess of $250,000. *East Oakland Health Alliance, Inc.*, 218 NLRB 1270, 1271 (1975) and *St. John's Hospital*, 281 NLRB 1163, 1164 (1986). The records subpoenaed by the General Counsel from Blue Cross/Blue Shield (GC Exh. 19) and Cigna Corp. (GC Exh. 20) establish that the Respondent received more than $250,000 per year in 2014 and 2015, and more than $114,000 in 2016, as payments from these entities. The Respondent's related bank records from Chase Bank (GC Exh. 21) and Wells Fargo Bank (GC Exh. 23) show that combined deposits received by the Respondent, largely from payments from multiple health insurance companies including Blue Cross/Blue Shield and Cigna Corp., total well over $250,000 in calendar years 2014, 2015, and 2016. Consistent with the record as a whole, these documents show that the Respondent received annual gross revenues in excess of $250,000.[12]

Moreover, there is no dispute that the Board has statutory jurisdiction over the Respondent, as the Respondent admits that it received services valued in excess of $5000 a year from out of state, which is sufficient to find that it engaged in more than a de minimis amount of interstate commerce.[13] *Valentine Painting and Wallcovering, Inc.*, 331 NLRB 883 (2000). Here, where the Respondent failed to appear at the hearing, failed to comply with witness and document subpoenas, refusing to supply the subpoenaed documents that the General Counsel sought to establish jurisdiction even after being directed to do so by my order, another administrative law judge's order, and the District Court's order, it would have been appropriate for the Board to exercise its discretionary jurisdiction even had there been insufficient documentary evidence to establish the Board's discretionary jurisdictional limit. *Tropicana Products, Inc*., 122 NLRB 121, 123 (1958); *Continental Packaging Corp*., 327 NLRB 400 (1998).

The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

In its answers to the complaint, the Respondent denied that the Union was a labor organization within the meaning of Section 2(5) of the Act, which states:

> The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

[11] GC Exh. 1(o) at 3; GC Exh. 1(ff) at 2.

[12] The Respondent's administrative manager Twannette Jeffress confirmed in her trial testimony that she regularly billed medical insurance companies for services rendered by the Respondent.

[13] GC Exh. 1(o) at 3; GC Exh. 1(ff) at 2.

Based on the entire record, including the unrefuted testimony of union representatives Javier Almazan, Sr. and Kevin DiMeco, the collective-bargaining agreement (GC Exh. 4) that employees ratified, the letter agreement on discipline procedures (GC Exh. 6), the pension fund agreement (GC Exh. 5), grievances filed by the Union to enforce agreements (GC Exhs. 8 and 10) and related correspondence (GC Exhs. 7 and 9), I find that the Union, which includes all three related sections (the IAM, District Lodge 166, and Local Lodge 971), exists for the purpose, in whole or in part, of dealing with employers concerning wages, hours, and other terms and conditions of employment, including investigating and processing grievances and addressing labor disputes, and that employees participate in the organization.[14] See *Alto Manufacturing Corp.*, 136 NLRB 850, 851-852 (1962); *Vencare Ancillary Services* 334 NLRB 965, 969 (2001); *Electromation, Inc.*, 309 NLRB 990, 994 (1992); Cf. *Coinmach Laundry Corp.*, 337 NLRB 1286, 1287 (2003).

The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

1. The Respondent and its operations.

TWC was operating before July 2013 until at least March 2016. The record does not establish precisely when the company was established, how long it remained operating, or whether it continued to operate in its original form or in a different form after March 2016. Although the record suggests that TWC may have ceased operations after March 2016, in the absence of evidence establishing that it has done, I proceed considering the complaint allegations based on the record before me. I assume for the purposes of this analysis, therefore, that TWC exists and is operating. In June 2015, TWC employed at leave four (perhaps five) behavior health technicians, two (or perhaps 3) therapists, and an administrative manager, in addition to its leadership and management team. By March 2016, additional managers became involved, and an administrative assistant had been hired.

[14] The unrefuted testimony of Almazan and DiMeco establishes the following: The Union's organizational structure contains a grand lodge, which is divided into regional territories, district lodges within each regional territory, and local lodges under them. Local lodges can be independent locals, which serve employees and service contracts of only one employer, or amalgamated locals, which serve employees and service contracts with multiple, smaller employers. Members of different lodges vote for stewards for their units and vote to ratify or adopt their collective-bargaining agreements. Union members can nominate stewards and contract negotiation team members and may vote on their selection "if there is an election." Tr. 19. District lodges have business representatives and organizers who administer and enforce contracts, investigate and process grievances, assist in arbitrations related to the contracts, negotiate first contracts, and successor contracts. If a steward or local lodge officers brings a grievance under a collective-bargaining agreement that is not resolved, it will be referred to a district business representative as a "third step" grievance, who will attempt to resolve it and then, as appropriate, represent the employee or the local in arbitration. See also descriptions of Almazan's and DiMeco's roles in Section II.A.2 below.

TWC operates as an alcohol and drug rehabilitation center in Palm Bay, Florida. Although it was not a hospital, some of its clients lived at the facility and received treatment as outpatients. Louis (Lui) Delgado and Frederick (Rick) Bertel were the founders and the original owners. Delgado, a counselor, provided leadership in the treatment area as the clinical director. A clinical director oversees the treatment plans, oversees the therapists, counselors, and behavioral technicians' provision of treatment to clients, ensures proper care, and oversees and signs off on medical charts. Bertel led TWC from the business side, which included overseeing payment, billing, and personnel management issues.

Beginning in about June 2015, David Mahler and Lee Stein, who together ran another addiction rehabilitation center in Delray Beach, Florida, became involved in the leadership of TWC, as managers, owners, or partners. Mahler and Stein appear to have owned a company called Professional Training Association (PTA), which managed the operations of their facility in Delray Beach, Comprehensive Addition Recovery (CARE). The specifics of the business relationships among owner/managers Mahler, Stein, Bertel, and Delgado with respect to TWC are not fully established on this record; however, the record supports my finding that all four continued to engage in the management and operations of TWC, following the introduction of Mahler and Stein as partners or co-owners of TWC in June 2015.

Twannette Jeffress, who testified at trial,[15] worked at TWC in an administrative support position from about October 2013 to about June 2016, first as an administrative assistant and later as a managing assistant. Jeffress handled bookkeeping, processed payroll, prepared accounts payable, processed billing including billing of healthcare insurance companies, answered phones, and dealt with some personnel issues. Jeffress was supervised by both Delgado and Bertel, and worked closely with Bertel, until sometime after June 2015, when David Mahler, Lee Stein, human resources director Pami Maughan, clinical director Celia Carmack, and manager Jill Scott from PTA/CARE. became increasingly more involved with TWC's operations and Delgado and Bertel became less involved. Jeffress was also a member of the bargaining unit. After about June 2015, she spoke with Mahler regularly, about twice a day, and also received direction from Scott, in the normal course of her duties.

Pami Maughan testified that she worked at CARE from about December 2015 to December 2016 as Human Resources Director. She reported to Stein. Stein told Maughan that he and Mahler were owners of TWC. Because TWC did not have a dedicated HR person, Maughan helped maintain employee files at TWC and dealt with employee issues at TWC the whole time she worked at CARE.[16]

The Respondent admits, and I find, that Bertel, Mahler, Stein, and Maughan are supervisors within the meaning of Section 2(11) of the Act. I further find, based on the authority exercised by each individual as established in the record and from the undisputed testimony supporting a finding that Bertel, Mahler, and Stein were owners of TWC, that they are agents of the Respondent within the meaning of Section 2(13) of the Act, as alleged in the complaint. I further

[15] Ms. Jeffress testified by video conference.

[16] Maughan currently works for an unrelated company. She left CARE in December 2016 because her work was reduced to part-time, and she understood that CARE was shutting down.

find that in failing to answer the allegation that manager Jill Scott is a supervisor within the meaning of Section 2(11) of the Act and Respondent's agent withing the meaning of Section 2(13) of the Act, the Respondent has admitted these allegations.[17]

Teresa Lee, who testified at trial, worked at TWC as a certified addiction professional from April 2015 until she was laid off on March 4, 2016. In this role, Lee performed group therapy and individual therapy. Her duties included performing a bio-psycho-social master treatment plan for her clients, preparing notes for group and individual sessions, preparing discharge summaries, and performing discharge planning. She was also responsible for documenting information in clients' charts and preparing reports, if there were any incidents. Lee worked full-time. Delgado was her direct supervisor.

Alice Kwolek, who also testified at trial, worked for TWC as a behavioral health technician from September 2013 to March 2016, when she was laid off. She usually worked evenings and occasionally worked day shifts. Delgado was her direct supervisor. Kwolek provided direct support to clients, guided them to their groups, assisted them with medications, and documented medications and tests given (e.g., urine test results) in an electronic medical record system called "Kipu." From her perspective, TWC did not have client charts.

2. <u>The Union, the bargaining unit, and the bargaining relationship with the Respondent</u>.

Almazan, Sr., works for the Union as the Grand Lodge Representative for the Southern Territory, which covers most of the Southern United States, including Florida. His duties include negotiating contracts, processing grievances and arbitrations, investigating internal matters with local lodges, monitoring elections, organizing employees, and assisting with education or training. His immediate supervisor is the Union's vice president, Mark London. In addition to TWC, the Union has contracts with many Florida employers, such as U.S. Sugar, Inc. in Clewiston, Okealanta Corp. in South Bay, Osceola Sugar Corp. in Pahokee, and Pratt & Whitney in West Palm Beach. In addition to Almazan served as a district business representative for the Union before he became a grand lodge representative. Other union representatives involved with the TWC unit at various times included Dave Porter, Robert Miller, and Kevin DiMeco.

Kevin DiMeco worked for the Union for at least 3.5 years, beginning in about winter of 2014, as an organizer and servicing bargaining agreements between the Union and employers. His direct supervisor was John Walker, a district business representative. DiMeco helped organize new groups of employees, assisted in representing employees by servicing bargaining agreements for the district, handling grievances for employees, and whatever was needed. He is assigned to District 166, which covers the TWC bargaining unit and contract. He had been assigned to TWC since about January 2015.

The Respondent and the Union entered a neutrality agreement in July 2013, which sets forth agreed-to terms for the Union's organizing efforts at the Palm Bay facility, including that the Respondent would recognize the Union in the event that the Union obtained proof of

[17] Moreover, the evidence suggests that Scott is a Sec. 2(11) supervisor based on Jeffress' unrefuted testimony regarding the assignment and responsible direction of Jeffress' work.

majority status.[18] On July 13, 2013, the neutrality agreement was signed by Rick Bertel and another individual for the Respondent and by David Porter for the Union.[19] Almazan engaged in organizing activities at TWC after the neutrality agreement was executed. After receiving a majority of signed authorization cards, Almazan contacted Bertel, and, on August 9, 2013, the Respondent and the Union entered a recognition agreement, in which the Respondent agreed to recognize the Union as the exclusive collective-bargaining representative of, and to bargain in good faith with the Union concerning, a unit of its employees.[20] Bertel and another individual signed the recognition agreement for the Respondent; Almazan and Porter signed for the Union.[21] Almazan requested dates to bargain, and, after some bargaining sessions, the parties reached a tentative collective-bargaining agreement, subject to ratification by the bargaining unit. The agreement was ratified by the employees on January 8, 2014 and executed by the parties on January 9, 2014.[22] The collective-bargaining agreement was in effect by its terms from January 9, 2014 to January 8, 2017, and extended annually by its terms, unless notice be given by either party. Also on January 9, 2014, the parties executed a separate standard agreement regarding required contributions to the IAM pension plan.[23]

The collective-bargaining agreement describes the bargaining unit as:

> All full-time and part-time technicians I, technicians II, lead technicians, counselors, therapists, nutritionist/spiritual advisors, and front desk/receptionists employed by Tropical Wellness Center, LLC.

I find that from at least January 9, 2014, the Respondent recognized the Union as the exclusive collective-bargaining representative within the meaning of 9(a) of the Act of the above bargaining unit, which is an appropriate unit within the meaning of 9(b) of the Act.

3. Addition of new leadership at TWC.

As discussed above, in about Spring 2015, Mahler and Stein joined the leadership of TWC as co-owners and managers with Delgado and Bertel. Employees learned of this occurrence at a June 2015 meeting at which they were told that Delgado and Bertel had taken on new partners, Mahler and Stein, from Delray Beach Florida. Direct care personnel attended, which included Teresa Lee and Alice Kwolek.[24] Delgado and Mahler spoke. Mahler did most of the talking. He discussed the history of his treatment center in Delray Beach, CARE, and how things would be going forward. Employees asked questions, such as to whom they would be reporting. Lee, for example, was told she would still be reporting to Delgado. Mahler told employees he would train

[18] GC Exh. 2.

[19] Id.

[20] GC Exh. 3. The unit description in the recognition agreement included janitorial, maintenance, instructors, house keepers, all non-confidential clerical employees, but excluding guards, and supervisory employees as defined by the Act is different from the unit description recognized by the parties in the collective-bargaining agreement.

[21] Id.

[22] GC Exh. 4.

[23] GC Exh. 5.

[24] Behavior technicians Joanne James, Greg Dombal, and Travis Beaver, and therapists Heather Strobe also attended.

them on a new computer-based records system, and that staff from CARE would come to train TWC employees on CARE's treatment programs. He also told them that some remodeling would be done. Mahler described that he was going to transform TWC into a state-of-the-art rehab center.[25]

TWC continued to function with the same professional employees for a series of months. It appears that, over time, Mahler and Stein took over more of the management roles, and Delgado and Bertel, became less involved. Several administrative personnel from CARE performed work for and sometimes at the TWC facility, including payroll and human resources personnel.

HR Director, Maughan testified that Stein told Maughan that TWC employees were represented by a union, and that *Stein wanted to get rid of the Union*. They were in Stein's office at CARE. Maughan testified that she told Stein that the union was for employees' benefits.

B. Alleged Failure to Maintain Terms and Conditions of CBA by Cessation of Union Dues Payments and/or Pension Fund Payments

1. Failure to continue remittance of Union dues.

(a) Related contract language.

The CBA required that the Respondent collect and regularly remit to the Union dues, as authorized by employees in the bargaining unit.

> **Article 3**
> **Dues Check-off**
> Section 1. Upon receipt of a written authorization form from an employee in the bargaining unit the employer shall deduct from the employee's wages an amount equal to monthly union dues which shall be deducted in a fixed amount each pay period and remitted to the Union. Once authorized, payroll check-off shall be irrevocable for a period of one year and automatically renewed each year thereafter. (GC Exh. 4 at 2)

(b) Cessation of dues remittance.

Union dues were remitted by the Respondent pursuant to the CBA under the leadership of Delgado and Bertel. Sometime after June 2015, employees noticed that their dues were not being deducted. Kwolek alerted Union representative DiMeco that the dues deductions had ceased. Kwolek had authorized the Respondent to remit her dues to the Union, and the dues had been regularly remitted to the Union before they ceased being remitted. Employees Jeffress and Teresa Lee testified that they too had authorized dues to be deducted by the Respondent to be forwarded to the Union. DiMeco testified that in about late-September or early-October 2015, he

[25] The record does not establish that any specific changes in wages, hours, or working conditions, other than this new computer system or that personnel from CARE would come up to train on their systems, were announced to employees at this meeting.

was called to the facility by an employee and learned that the Respondent's new partner had instructed an employee to stop remitting Union dues.

Jeffress, a bargaining unit member, testified that she had been told on multiple occasions to cease remitting dues to the Union in her role as bookkeeper, payroll, and accounts payable. About a month after Mahler and Stein took over, Bertel and Mahler told Jeffress to stop remitting union dues. Every two weeks, before paying bills, Jeffress would send a list of expenses to manager Jill Scott. Scott and Mahler reviewed the list and decided which items to pay. Jeffress included the Union dues on the list. Scott told her repeatedly to take the dues off the list; Jeffress repeatedly responded that the Respondent signed a contract, and they had to pay the dues. Scott worked for CARE and did some work at TWC. Scott did the bills and worked with Mahler on financial issues. Scott told Jeffress what bills to pay from the list Jeffress wrote, after Scott talked to Mahler. Scott worked in the office with Mahler at CARE; they communicated with Jeffress by email, fax, and verbally.

Jeffress testified that she continuously put the union dues on her list to Mahler and Scott. At first, she didn't say anything to them about it; eventually, in July or early August 2015, Mahler asked why she kept putting the union dues on the payment list. They only paid the union dues once per month. She was first told not to put the union dues payment on her lists by Scott; but she kept putting them on for a month. Then, Bertel and Mahler told her not to put [the union dues payments] on the payments list. At some point, when Jeffress submitted the expenses for the union dues to Scott, Scott said, "*we're not fucking paying them*." [Tr. 99] Jeffress testified that she responded, you took over all liabilities when you bought the company. Scott called Mahler. At another time, Scott told Jeffress about the union dues, "*I don't give a damn, we're not paying them*," and that they're "*not going to be part of the union*." Jeffress told her they had signed the agreement.

Jeffress testified that every time they told her to take the dues off the payment list, she told them there was a contract and they had to pay them. Jeffress told Scott that the employees were represented by a union at some time in 2015. After she told Scott that employees were represented by a union, Scott came in [to Jeffress' office] and demanded to see the contract. Jeffress told Scott she had sent her the contract a couple of times; she had also sent it to Mahler and Stein. She gave Scott the hard copy.[26] She doesn't recall what month it was. Scott asked if Jeffress had read the contract, and she answered no. She told Jeffress to find Bertel. Then Bertel came into Jeffress' office and Scott and he went outside her office and spoke. Jeffress could hear because their discussion was loud. Lee Stein was outside the door, and the people in her office went outside. Jeffress testified that she sent a copy of the collective-bargaining agreement to Mahler at least 3 times.

[26] Jeffress testified that there were other people in the room when she gave the contract to Scott, but the record is unclear regarding who they were. She testified that "Pepper," a clinical director from CARE was in her office, when Scott and Bertel were talking. Jeffress testified that when Pepper learned what they were discussion, she asked Jeffress questions like, why we would be represented by a union, why did we do that, or what were we getting out of it?

Someone from the Union called Jeffress about the dues not being paid. Jeffress had a close relationship with the union person, whose name she no longer recalls, because she always paid them. In month 2 or 3 [after Mahler and Stein arrived], the Union representative called to follow up and to find out what was going on. Jeffress told her that she had been told not to pay the dues.

Eventually, Kevin DiMeco from the union got involved, and they learned that pension payments had not been made either.

The Respondent admits in its answer that it ceased deducting union dues from employees' earnings and ceased remitting dues to the union. (GC Exh. 1(ff) at 3) The Respondent avers without explanation or supporting evidence that there was no valid CBA that required it to deduct or remit the dues.

(c) Grievance(s) filed and attempts to negotiate.

In October 2015, DiMeco met with Bertel at TWC and orally filed a grievance with Bertel about the failure to remit union dues. (GC Exh. 8) They also discussed that DiMeco had learned that the Respondent had failed to make pension payments to the Union's fund. DiMeco testified that he also gave Bertel a written grievance. Bertel agreed to follow up and get the monies owed to the Union. DiMeco followed up with Bertel on October 12, 2015 by phone; Bertel told DiMeco he was taking care of it. Bertel texted DiMeco a copy of a check that he purportedly was about to mail to the International Union regarding the Union dues owed. Bertel reported he was still looking into the pension monies owed. A few days later, DiMeco contacted the International and learned the union dues had not been remitted by the Respondent. DiMeco then attempted to reach Bertel by phone, email, and in person at the TWC facility. (See GC Exh. 9) Jeffress testified that DiMeco came to the facility looking to speak with Bertel at about that time. In his email, DiMeco testified that he asked Bertel to arrange for DiMeco to meet with the new owners. He did not hear back from Bertel.

2. Failure to make pension payments.

(a) Related contract language.

The CBA requires that the Respondent remit monies reflecting hourly contributions per for each employee and sets forth the rates.

> **Article 15**
> **Pension**
>
> Section 1. The parties agree that the IAM National Pension Plan will be the pension plan for all eligible bargaining unit members. …
>
> Section 2. The employer agrees to make pension contributions to the IAM Labor Management Pension Fund for each employee covered by this agreement. … The terms and conditions outlined in the standard form "Participant Agreement" executed by the parties and filed with the IAM Labor Management Pension Fund shall be part herein, and shall remain in effect for the length of this Agreement. …
>
> (GC Exh. 4 at 8-9)

The Respondent and Union further agreed through the IAM National Pension Fund, National Pension Plan's Standard Contract Agreement, to remit monies to the Fund and Plan based on hours worked by each employee in the unit. (GC Exh. 5).

(b) Failure to make pension fund payments.

After speaking with an administrator of the plan, DiMeco learned that no monies had ever been remitted to the plan pursuant to the CBA on behalf of employees. He raised this issue with Bertel, who said he would look into it. DiMeco made multiple additional attempts to reach Bertel about the issue but did not hear from him.

Jeffress testified that she had not paid the pension, because she never read the CBA. About the next day after the lack of pension payments was first raised by DiMeco, Bertel stormed into Jeffress' office about the pension issue. Bertel asked, "you never paid the pension?" She responded that no one told her to, and that no one mentioned until DiMeco mentioned it. Bertel said, "you didn't read the contract?" Jeffress said it had nothing to do with her. Jeffress does not recall what date that was. She recalls that the Union filed a lot of grievances, and there were a lot of discussions that they'd not gotten paid. [TWC] just never paid them.

The Respondent admits in its answer that it failed to make pension payments on behalf of employees. (GC Exh. 1(ff) at 3) The Respondent avers without explanation or supporting evidence that there was no valid CBA that required it to deduct or remit the dues.

(c) Grievance filed, information requested, and attempts to negotiate.

DiMeco filed a grievance with the Respondent regarding the failure to remit required monies to the pension fund and plan.[27] (GC Exh. 10) On October 23, 2015, DiMeco had brought the grievance to be filed to the TWC facility, and, at the direction of Bertel, Jeffress had signed it, providing a waiver of the deadline. I credit Jeffress' unrefuted testimony that she called Bertel and he gave her permission to sign the grievance and receive it from the Union. TWC did not respond the grievance.

After filing the grievance regarding the failure to make pension payments, DiMeco filed an information request about the grievances and mailed it to Bertel at TWC by certified mail. It was returned to him as not accepted. DiMeco went to the facility on about November 12 and delivered the information request in person. (GC Exh. 11) Eventually, DiMeco reached Bertel by phone about the information requests. Bertel told DiMeco, it was a lot of information. DiMeco responded that he had to do his due diligence. Bertel said he was working to get the information. In the call, they discussed both the union dues and the pension monies grievances. Bertel stated that he thought the Union dues should have been taken care of, and DiMeco reported that the IAM had not received them. Again, DiMeco asked to speak to the new partners at TWC, David Mahler and Lee Stein. Bertel said he would keep working on it.

[27] Although DiMeco testified that he brought the grievance to TWC on about November 12 and delivered it to the front desk, it was dated October 23 by his and Jeffress' signatures.

By a letter dated November 4, 2015 to Bertel, DiMeco requested the following information to be provided by November 13:

1. A list of all current and former bargaining unit employees covered by the collective bargaining agreement from January 9, 2014 to present. Provide their hire date, wage, termination date (if applicable) job classification, date of birth and address.
2. Provide a list of employer contribution to the IAM National Pension Fund beginning January 9, 2014 to present.
3. Provide contact information of the new partner/owner of Tropical Wellness Center. (GC Exh. 11)

The information was never provided.

C. March 4, 2016 Layoff of Bargaining Unit Employees

1. March 4 Layoffs.

On March 4, 2016, all direct care employees were called to a meeting at TWC. Lee and Kwolek attended the meeting.[28] At the meeting, employees were told they were all being laid off. Employees report being told somewhat different explanations for the reason for the layoffs. Certified Addiction Professional Teresa Lee testified that Pami [Maughan] and Celia Carmack, directors from CARE, told employees that TWC would shut down and employees would be let go. Maughan also explained that they could reapply for their jobs. Carmack or Pami stated that the "files were a mess," apparently implying they would need to close and reopen to come back into compliance of some sort. Lee testified that this was the first she had heard that TWC's files or charts had issues or deficiencies. In fact, she was told by CARE and TWC directors that her charts were used in training as examples of how to properly complete charts. Lee had seen some jobs posted online for direct care jobs at TWC already and mentioned that to Pami. (See GC. Exh. 12 and 13) Employees were told to clean out their offices and leave the property—they were not permitted to talk to their clients. Employees were not provided with their final checks at the meeting.

Behavioral Health Tech Alice Kwolek recalled being told that they were closing down because they had only 3 clients and would revamp and open up after figuring out how to make the place work. She denied that employees were told that there was any problem with their charts.

The Respondent admits that it terminated the employment of employees Travis Beaver, Greg Dombal, Joanne James, Alice Kwolek, Teresa Lee, Trinity Phillips, and Heather Moore Strobel on March 4, 2016, but denies that the terminations were unlawful.[29] The Respondent asserts that employees were terminated in order to mitigate state law violations committed by acts or omissions of employees, creating exigent circumstances upon which the Respondent was

[28] Testimony suggests that Greg Dombal was not at the meeting.
[29] Its answer does not admit that Jamie Kollock was laid off or terminated.

legally and ethically obliged to act.[30] The Respondent provided no details or statutory references in its answer, beyond these assertions.

Regarding the March 4 layoffs, HR Director Maughan testified that "we had to lay them off because we were shutting down the facility." Tr. 48. Maughan was told by Carmack, the clinical director of both TWC and PTA, that the charts [at TWC] were out of compliance and that required treatment was not happening. About a week before the layoffs, Maughan and Carmack went to Stein to discuss the situation with the TWC charts. Stein would have made the layoff decision. In the meeting with Stein, Maughan asked Stein about the union; Stein replied, "*don't worry about it. I got it*." (Tr. 50) He did not explain what that meant, and Maughan testified that she does not know what he may have done in that regard. A few days later, however, Mahler called her and told her that he "*got it*," that he "*took care of the union issues*." (Tr. 51)

The Respondent did not provide any prior notice to the Union regarding the layoffs.

At the March 4 meeting regarding layoffs, Maughan did most of the talking. She told employees that they were laid off at a meeting at TWC in the unused group rooms. She and Carmack, as well as the affected "rehabilitation side" employees--about 8 or 9 employees--attended the meeting. Maughan told employees what she had been told about the charts from Carmack, and that the care being given was below state-required levels. She testified that she told employees that if they were audited, they would be shut down. Maughan explained that the employees' positions were no longer necessary, "obviously, since we [were] going to be shut down[.]" (Tr. 52) Maughan also told employees that they would be revamping, and they could reapply for their positions. She observed that the employees were upset and angry. She told them they had time right then to clean out their offices and turn in their badges, keys, or other company property. She explained about benefits, when they would be ending for those that had them. The "laid off" employees were never recalled.

2. Timing of Filing of Board Charges.

On January 19, 2016, the Union filed a charge alleging that the Respondent had been violating Section 8(a)(5) and (1) by refusing to meet for grievances, refusing certified mail from the Union regarding information requests, refusing to remit union dues take from members, refusing to comply with the terms of the CBA regarding pension payments, and refusing to bargain in good faith. This charge was amended on March 22 to allege that since about October 2015 the Respondent had been refusing to recognize the Union and refusing certified mail from the Union, refusing to provide information requested, refusing to remit union dues, and refusing to comply with the terms of the CBA to pay employee's pension plan. It was further amended on March 29.

As noted above, the layoffs occurred on March 4, 2016. On March 9, 2016, the Union filed a charge alleging that the Respondent violated Section 8(a)(3), (4), and (1) by discriminatorily discharging employees in retaliation for their union support or for the purpose of discouraging union support, and in retaliation for Board charges filed by the Union.

[30] See GC Exh. 1(ff)

III LEGAL ANALYSIS

A. Did the Respondent unlawfully fail to continue in effect the terms of the collective-bargaining agreement by failing to remit union dues, in violation of Sec. 8(a)(5) and (1), within the meaning of Sec. 8(d)?

The Act imposes the duty to bargain in good faith regarding employees' wages, hours, and working conditions on both employers and unions. Upon reaching collectively bargained agreements, the agreement creates obligations and confers rights on employers and the union. See Sec. 8(a)(5) , 8(b)(3), and 8(d); see also *MV Transportation, Inc*. 368 NLRB No. 66, slip op. at 1, 2, 3, 9-12 (2019). Although it is well established that an employer does not violate the Act if the parties' agreement, in fact, expressly grants it the right to take certain actions, it is also well established, under Board law and traditional contract principals, that an employer may not act in direct abrogation of the clear language of the collectively bargained agreements. Id. See e.g., *P.A. Hayes, Inc.,* 226 NLRB 220 (1976); see also *City Cartage Co*., 266 NLRB No. 80 (1983). Section 8(d) of the Act imposes the requirement that when a collective bargaining agreement is in effect, and employer may not modify the terms and conditions of employment contained in the agreement, without the union's consent. In *MV Transportation*, *Inc*., the Board overruled its longstanding application of its "clear and unmistakable waiver standard," when interpreting whether an employer's unilateral action was permissible under the Act, applying instead the "contract coverage" standard. In the "contract coverage" standard, the Board will first look to plain language of the agreement under scrutiny and consider whether the Respondent's disputed action was within the "compass or scope" of contractual language granting the employer the right to act unilaterally. If the disputed act does not come within the "compass or scope" of contractual language granting the employer the right to act unilateral, the analysis is still one of whether the union has clearly and unmistakably waived its rights to bargain about the issue. Id.

The Board further explained that its holding in *MV Transportation, Inc.,* "solely addresses those cases in which an employer defends against an 8(a)(5) unilateral change allegation by asserting that the contractual language privileges it to make the disputed change without further bargaining." Id at 11. Here, the Respondent does not specifically make this argument, but instead asserts, without having presented evidence or argument, that it is not subject to the parties' collectively bargained agreements at all, i.e., that the contracts are not valid. In the absence of contrary evidence or argument, I find that the record sufficient to find that the CBA and related pension agreements are valid and were implemented lawfully[31].

An employer violates Section 8(a)(5) of the Act within the meaning of 8(d) when it ceasing to deduct union dues and/or forwarding them to the union, in violation of express language in a collective bargaining agreement. See *Shen-Mar Food Products*, 221 NLRB 1329 (1979) *and MBC Headware, Inc.*, 315 NLRB 424, 425 (1994).

The Respondent admits and I find that it has failed to remit Union dues. (GC Exh. 1(ff) at 3; see also GC Exh. 7) The Respondent failed to present any argument or evidence to support its

[31] I address the *MV Transportation* standard here, even though it was not specifically raised by the Respondent, because the Board determined to apply this holding retroactively, after the Respondent filed its answer to the complaint.

assertion that it was not bound by its collective-bargaining agreement with the Union that required it to do so. I find that since on or about July 19, 2015, the Respondent has failed to continue in effect all of the terms of the collective-bargaining agreement described Article 3 of the parties CBA without the Union's consent by failing and refusing to make monthly deductions of union dues from the wages of employees in the Unit who have signed dues check-off authorizations and failing and refusing to remit union dues to the Union, as required by Article 3 of the collective-bargaining agreement. See *Shen Mar Food Products*, above, and *MBC Headware, Inc*., above. In doing so, without the Union's consent, and in the absence of a clear and unmistakable waiver by the union of the right to bargain about union dues, the Respondent has been violating Sec. 8(a)(5) and (1) of the Act, within the meaning of Section 8(d), as alleged in the complaint.

B. Did the Respondent unlawfully fail to continue in effect the terms of the collective-bargaining agreement by failing to make monthly contributions to the pension, in violation of Sec. 8(a)(5) and (1), within the meaning of Sec. 8(d)?

The Board has determined that an employer violates Section 8(a)(5) of the Act when it fails and refuses to make contractual pension payments. See, e.g., *Alvin Greeson, d/b/a Greeson Masonry*, 298 NRLB No. 163 (1990) and *Island Transportation Co*., 307 NLRB No. 187 (1992).

The Respondent admits and I find that it has failed to make pension payments as described in the parties collectively bargained agreements. (GC Exh. 1(ff) at 3) As noted above, the Respondent failed to present any argument or evidence to support its assertion that it was not bound by its collectively bargained agreements with the Union.

Consistent with my discussion regarding the union dues payments above, I find that Respondent's action in failing to remit pension payments as required by the clear language of the CBA, and by the language of the additional, executed pension agreements, is not "covered by" the CBA or related agreements, within the meaning of that term in *MV Transportation*, above, and that the union did not waive its rights to insist on the payments. Thus, I find that since on or about July 19, 2015, Respondent has failed to continue in effect all of the terms of the collective-bargaining agreement described in Article 15 of the parties by failing and refusing to make monthly pension fund contributions to the IAM Labor Management Pension Fund, IAM National Pension Plan (the Pension Fund), as required by Article 15 of the CBA, without the Union's consent.

C. Did the Respondent fail to bargain in good faith with the Union regarding grievances filed since October 20, 2015, in violation of Sec. 8(a)(5) and (1)?

The Board finds that an employer's wholesale refusal to participate in grievance-arbitration meetings or proceedings required pursuant to a CBA violates its responsibility to bargain in good faith with the union. *Trailmobile Trailer*, LLC, 343 NLRB 95, 96-97 (2004); see also See *GAF Corp.*, 265 NLRB 1361, 1364–1365 (1982); *Independent Stave Company, Diversified Industries Division*, 233 NLRB 1202, 1204 (1977).

I rely on the unrefuted testimony of Union representative DiMeco, supported by correspondence in evidence and corroborating testimony of employee Jeffress, that the Respondent, primarily through owner/manager Bertel, failed and refused to respond to DiMeco's many attempts to address grievances filed by the Union addressing the failures to remit union dues and failures to make pension payments. I find, therefore, that since on or about October 20,

2015, the Union, by email and orally, has requested that Respondent meet and bargain collectively with the Union as the exclusive bargaining representative of the Unit, regarding grievances with respect to Respondent's failure and refusal to remit union dues and make pension contributions. (GC Exh. 1(r)) See *Trailmobile Trailer, LLC*, above. I find that the Respondents mere assertions that it was not obliged to recognize or bargain with the Union, without more, cannot sustain its vague defenses set forth in its answer to the complaint. (GC Exh. 1(ff))

Based on the above, I find as alleged in the complaint, that, since on or about October 20, 2015, Respondent has failed and refused to meet and bargain collectively with the Union pursuant to its requests and has failed and refused to recognize the Union as the exclusive collective bargaining representative of the employees in the Unit, in violation of Section 8(a)(5) and (1).

D. Has the Respondent unlawfully failed and refused to furnish the Union with requested information since November 4, 2015?

The Act requires that an employer furnish, upon request from its employees' recognized union, information that is relevant and necessary to the union in discharging its statutory responsibilities as collective-bargaining representative. *NLRB v Acme Industrial Co*., 385 U.S. 432 (1967). The Board applies a liberal, discover-type standard in determining whether the information requested should be provided. Id. See also, *Oil, Chemical & Atomic Workers Local Union No.6-418 v. NLRB*, 711 F.2d 348, 358 (D.C. Cir. 1983). These duties include monitoring compliance with, and effectively policing the collective-bargaining agreement; enforcing provisions of the CBA; and processing grievances. *American Signature, Inc*., 334 NLRB 880, 995 (2001).

As alleged in the complaint, the record establishes that on or about November 4, 2015, the Union requested in writing that Respondent furnish the Union the following information:

> (i) A list of all current and former bargaining unit employees covered by the collective bargaining agreement between Respondent and the Union from January 9, 2014, to present, and the hire date, wage, termination date (if applicable), job classification, date of birth and address of each such employee.
> (ii) A list of the employer contributions to the Pension Fund from January 9, 2014, to present.
> (iii) Contact information for the new partner/owner of Respondent.
> (GC Exh. 1(r), GC Exh. 11)

I find that information requested by the Union in GC Exh. 11 is necessary for and relevant to, the Union's performance of its duties as the exclusive bargaining representative of the Unit. The information regarding the identity and employment status of unit members, and the information regarding pension payments are presumptively relevant to the Union's representation responsibilities. See, e.g., *Ohio Power, Co.*, 216 NLRB 987, 991, enfd. 532 F.2d 1381 (6th Cir. 1976) and *Dyncorp/Dynair Inc*., 322 NLRB 602 (1996), enfd. 121 F.3d 698 (4th Cir. 1997). The Respondent has provided no explanation for its failure and refusal to furnish the Union with the above information, other than the assertions in its answer that it has not obligation to do so, which I have already addressed. It has failed to rebut the strong presumption of relevance.

Regarding the request for contact information of the Respondent's "new partner/owner," under all the circumstances of this case, including the failure of Bertel, the Union's original contact,

to respond to DiMico's attempts to discuss grievances and determine what was going on with the Respondent's payments, I find that the General Counsel has supplied sufficient evidence that the information is relevant and necessary for the Union's collective-bargaining duties. See e.g., *Bell Telephone Laboratories*, 317 NLRB 802, 803 (1995), enfd. mem. 107 F.3d 862 (3rd Cir. 1997) and Beth Abraham Health Services, 332 NLRB 1234 (2000). See also, *Oil, Chemical & Atomic Workers Local Union* No.6-418, above.

Based on the above, I find, as alleged in the complaint, that, since on or about November 4, 2015, the Respondent has failed and refused to furnish the Union with the information requested by it as described above in violation of Section 8(a)(5) and (1).

E. Did the Respondent unlawfully lay off bargaining unit employees on March 4, 2016?

1. Allegation of unlawful motive in violation of Sec. 8(a)(3) and (1)

In determining whether a layoff (or discharge) is unlawful, the Board applies the mixed motive analysis set forth in *Wright Line,* 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983). Under *Wright Line,* the General Counsel must make an initial showing that antiunion animus was a substantial or motivating factor for the employer's action by demonstrating that: (1) the employee(s) engaged in union activity; (2) the employer had knowledge of that union activity; and (3) the employer harbored antiunion animus. *Nichols Aluminum LLC*, 361 NLRB No. 22, slip op. at 3 (2014), citing *Amglo Kemlite Laboratories, Inc.,* 360 NLRB No. 51, slip op. at 7 (2014). Although proof of animus and discriminatory motivation may be based on direct evidence or inferred from circumstantial evidence, the Board has recently explained that, to meet his initial burden, the evidence must support a connection or relationship between the antiunion animus and the alleged unlawful act. *Tschiggfrie Properties Ltd*., 368 NLRB No. 120 (2019).

If the General Counsel meets his burden, then the burden shifts to the Respondent to prove that it would have taken the same action absent the employee's protected conduct. *Wright Line,* 251 NLRB at 1089; *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 399-403 (1983).
Showing that it had a legitimate reason for its action will not meet this burden; rather, the employer must demonstrate that it would have taken the same action in the absence of the protected conduct. *Bruce Packing Co.*, 357 NLRB No. 93, slip op. at 3-4 (2011).

I find that the hostile statements made to employee Jeffress by Scott and Mahler regarding their refusal to pay union dues pursuant to the collective bargaining agreement, and the Stein's statement to Maughan that he intended to get rid of the union, as well as the abrogation of the collective bargaining agreement's core provisions of the remittance of union dues and pension payments, and the failure to process grievances, supports a finding that the Respondent held antiunion animus against the bargaining unit. Respondent obviously knew the bargaining unit was affiliated with the union. Even though the antiunion animus was not directed at particular employees, here, the animus demonstrated toward the very existence of the bargaining relationship is reasonably connected to the layoff of the entire unit. Therefore, I find that the General Counsel met his initial showing of that the March 4 layoffs were motivated, in

substantial part, by antiunion animus. The burden shifts to the Respondent to demonstrate that it would have taken the same action in the absence of the union activity. As noted above, the Respondent failed to participate in the hearing, failed to present any evidence, and failed to file any posthearing legal briefs. Therefore, the Respondent failed to rebut the initial evidentiary showing pursuant to *Wright Line*, above.

Although I credit HR Director Maughan's testimony that she understood that a motivation for the layoffs was the purported substandard maintenance of client charts and substandard client care. However, I find that this information alone, in the absence of evidence from the Respondent to corroborate this purported motivation, is insufficient to meet the Respondent's burden to show it would have taken the same actions in the absence of the union activity. See *Bruce Packing Co.*, above. In support of this finding, I also credit employee Lee's testimony that she had been told her client charts were well done, that they were used as examples in training new employees, and that she had not heard before the March 4 announcement of the layoffs of any problem with the charts. Tr. 63-64.

I conclude, therefore, that on or about March 4, 2016, Respondent laid off its employees Travis Beaver, Greg Dombal, Joanne James, Jamie Kollock, Alice Kwolek, Teresa Lee, Trinity Phillips, and Heather Moore Strobel, and its other employees in the Unit whose names are presently not known, because they joined and supported the Union and engaged in concerted activities, and to discourage employees from engaging in these activities, as alleged in the complaint, in violation of Section 8(a)(3) and (1) of the Act.

2. Allegation of unlawful motive in violation of Sec. 8(a)(4) and (1)

In contrast to the 8(a)(3) allegation discussed above, I find that the record does not establish that the Respondent was motivated by animus toward the employees' or the Union's participation in NLRB proceedings. Alleged violations of 8(a)(4) that present mixed motive questions are analyzed under *Wright Line* framework. *McKesson Drug Co*., 337 NLRB 935, 936 (2002). I am not convinced that the timing of the layoffs 6 weeks after the initial charge was filed is sufficiently close to support an inference that a reason for the layoffs was hostility toward the Union's or the employees' access to or cooperation with Board. Although I have found sufficient antiunion animus related to the Union's representation of the unit employees and its actions taken on behalf of the employees, I do not find that this antiunion animus, in this context, has been shown to also reflect animus toward filing of charges or any other activity connected to the employees' statutory rights to access the Board processes. I find that the record evidence is insufficient to establish the initial evidentiary burden under *Wright Line*, above. Therefore, the 8(4) allegation is dismissed.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following individuals held the positions set forth opposite their names and have

been supervisors of the Respondent, within the meaning of Section 2(11), and agents of the Respondent, within the meaning of Section 2(13) of the Act.

Frederick (Rick) Bertel	Director of Marketing
David Mahler	Owner and Managing Member
Pami Maughan	Director of Human Resources
Jill Scott	Manager
Lee Stein	Owner and Managing Member

4. On August 9, 2013, the Respondent recognized the Union as the exclusive representative of employees at its Palm Bay, Florida facility, following the Union's offer to demonstrate majority support based on signed authorization cards.

5. On January 9, 2014, the Respondent and the Union entered into a collective-bargaining agreement covering the wages and other terms and conditions of employment of employees, effective by its terms from January 9, 2014 to January 8, 2017, and extended annually by its terms, unless notice be given by either party.

6. From at least January 9, 2014, the Respondent recognized the Union as the exclusive collective-bargaining representative within the meaning of 9(a) of the Act of the following bargaining unit, which is an appropriate unit within the meaning of 9(b) of the Act:

> All full-time and part-time technicians I, technicians II, lead technicians, counselors, therapists, nutritionist/spiritual advisors, and front desk/receptionists employed by Tropical Wellness Center, LLC.

7. Since July 19, 2015, by ceasing the remittance of employees' union dues through payroll deductions pursuant to the collective-bargaining agreement that were authorized by employees, without the Union's consent, and by failing and refusing to make monthly pension payments to IAM Labor Management Pension Fund, IAM National Pension pursuant to the parties' agreements without the Union's consent, the Respondent has been violating Section 8(a)(5) and (1), within the meaning of Section 8(d) of the Act.

8. Since October 20, 2015, the Respondent has been failing and refusing to recognize and bargain with the Union as the employees' collective-bargaining representative and to maintain in effect the terms and conditions of employment of the parties' collective-bargaining agreement by failing to respond to the Union's requests to meet and confer concerning grievances, in violation of Section 8(a)(5) and (1), within the meaning of Section 8(d).

9. Since November 4, 2015, by failing and refusing to furnish information requested by the Union that is relevant and necessary to the Union's role as bargaining representative, the Respondent has been violating Section 8(a)(5) and (1) of the Act.

10. By laying off bargaining unit employees on March 4, 2016 because they joined and assisted the Union and engaged in protected concerted activity and/or in order to

discourage union activity, the Respondent violated Section 8(a)(3) and (1) of the Act.

11. The record does not establish a violation of Section 8(a)(4) the Act as alleged in the complaint.

12. The unfair labor practices found affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(5), (3) and (1) of the Act, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having engaged in unlawful contract modifications, must rescind the modification made and restore the status quo. The Respondent, having discriminatorily laid off employees must offer them reinstatement and make them whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010).

Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the discriminatees for the adverse tax consequences, if any, of receiving one or more lump sum backpay awards covering periods longer than 1 year, *Don Chavas, LLC d/b/a Tortillas Don Chavas,* 361 NLRB No. 10 (2014). The Respondent shall compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 12, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year for each employee. See *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016). The Respondent shall also compensate affected employees for their search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. See *King Soopers, Inc.*, 364 NLRB No. 93 (2016). Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, above.

Having found that the Respondent violated Section 8(a)(5) and (1) within the meaning of Section 8(d) by failing to deduct dues and remit them to the Union on behalf of eligible employees without the Union's consent, I shall order the Respondent to make employees whole for any dues the Union would have received on their behalf after June 19, 2015 absent the Respondent's unlawful conduct, with interest at the rate prescribed in *New Horizons*, above, compounded daily as prescribed in *Kentucky River Medical Center*, above, and without recouping the money owed for past dues from employees by remitting the dues owed to the Union. The dues should be remitted consistent with the Board's holding in *Valley Hospital Medical Center, Inc., d/b/a Valley Hospital Medical Center*, 368 NLRB No. 139 (2019).

Having found that the Respondent violated Section 8(a)(5) and (1) by failing to remit contributions to the IAM Labor Management Pension Fund, IAM National Pension after June 19, 2015 I shall order the Respondent to make whole its unit employees by making all such delinquent fund contributions to the pension funds, including contributions it would have made but for failure to recall unit employees, and including any additional amounts due the funds in accordance with *Merry-weather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

Further, the Respondent shall be required to reimburse unit employees for any expenses ensuing from its failure to make the required fund contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891, 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981). Such amounts should be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the employer's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

Finally, having found that it violated Section 8(a)(5) and (1) by failing and refusing to furnish the Union with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees, I shall order the Respondent to cease and desist from this conduct and to furnish the requested information.

The General Counsel has requested that the make whole remedy include consequential damages. As I am unaware of the Board having ordered consequential damages as make whole remedies, I decline to grant them here.

ORDER

The Respondent, Tropical Wellness Center, LLC, Palm Bay, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with the International Association of Machinists and Aerospace Workers,[32] AFL-CIO (Union) as the exclusive collective-bargaining representative of employees in the following appropriate unit:

[32] References to the Union include, collectively, three related entities: the charging party (the IAMAW), IAM District Lodge 166 (AFL-CIO), and IAM Local Lodge 971.

All full-time and part-time technicians I, technicians II, lead technicians, counselors, therapists, nutritionist/spiritual advisors, and front desk/receptionists employed by Tropical Wellness Center, LLC.

(b) Failing and refusing to maintain in effect agreed-to terms and conditions of employment pursuant to collectively bargained agreements during the terms of the collectively bargained agreements, without the Union's consent.

(c) Failing and refusing to remit employees' union dues through payroll deductions, as authorized by employees and pursuant to the collective-bargaining agreement, without the Union's consent.

(d) Failing and refusing to make monthly pension payments to IAM Labor Management Pension Fund, IAM National Pension (the IAM Pension Fund) pursuant to the parties' collectively bargained agreements, without the Union's consent

(e) Refusing to bargain with the Union by failing and refusing to furnish information requested by the Union that is relevant and necessary to the Union's role as the exclusive collective-bargaining representative of bargaining unit employees.

(f) Failing and refusing to meet and confer with the Union, upon request, regarding grievances filed pursuant to the collective-bargaining agreement.

(g) Laying off bargaining unit employees because they joined and assisted the Union and engaged in protected concerted activity and/or in order to discourage union activity.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize the Union as the exclusive collective bargaining representative of employees in the unit described above, and, upon request, bargain with the Union concerning wages, hours, and other terms and conditions of employment of unit employees.

(b) Maintain in effect the terms of collectively bargained agreements with the Union concerning the terms and conditions of employment of unit employees during the terms of the agreements, unless the Union consents to the Respondent's proposed changes.

(c) Remit to the Union all outstanding dues owed by unit employees since July 19, 2016, which were unlawfully withheld, in the manner set forth in the Remedy section of this decision.

(d) Remit to the IAM Pension Fund outstanding monies owed for unit employees since July 19, 2016 in the manner set forth in the Remedy section of this decision.

(e) Upon request, promptly furnish the Union with information requested that is relevant and necessary to the Union's role as the exclusive collective-bargaining representative of bargaining unit employees; specifically, within 14 days from the date of the Board's Order, furnish the information requested by the Union on about November 4, 2015.

(f) Rescind the layoffs of employees Travis Beaver, Greg Dombal, Joanne James, Jamie Kollock, Alice Kwolek, Teresa Lee, Trinity Phillips, and Heather Moore Strobe, and other bargaining unit employees laid off on March 4, 2016, if any.

(g) Within 14 days from the date of the Board's Order, Travis Beaver, Greg Dombal, Joanne James, Jamie Kollock, Alice Kwolek, Teresa Lee, Trinity Phillips, and Heather Moore Strobe, and other unit employees laid off on March 4, 2016, if any, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(h) Make whole Travis Beaver, Greg Dombal, Joanne James, Jamie Kollock, Alice Kwolek, Teresa Lee, Trinity Phillips, and Heather Moore Strobe, and other unit employees laid off on March 4, 2016, if any, for any loss of earnings and other benefits suffered as a result of the unlawful layoffs, in the manner set forth in the remedy section of the decision.

(i) Compensate Travis Beaver, Greg Dombal, Joanne James, Jamie Kollock, Alice Kwolek, Teresa Lee, Trinity Phillips, and Heather Moore Strobe, and other unit employees laid off on March 4, 2016, if any, for their search-for-work and interim expenses regardless of whether those expenses exceed their interim earnings.

(j) Compensate Travis Beaver, Greg Dombal, Joanne James, Jamie Kollock, Alice Kwolek, Teresa Lee, Trinity Phillips, and Heather Moore Strobe, and other unit employees laid off on March 4, 2016, if any, for the adverse consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director of Region 12, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(k) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful layoffs, and within 3 days thereafter notify Travis Beaver, Greg Dombal, Joanne James, Jamie Kollock, Alice Kwolek, Teresa Lee, Trinity Phillips, and Heather Moore Strobe, and other unit employees laid off on March 4, 2016, if any, in writing that this has been done and that the layoffs will not be used against them in any way.

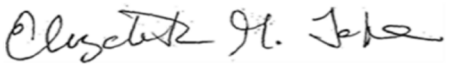
(l) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records,

timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(m) Within 14 days after service by the Region, post at its facility in Palm Bay, Florida, copies of the attached notice marked "Appendix"[33]. Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition, due to the mass layoff of employees and the likely potentiality that employees have dispersed, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and all former employees employed by the Respondent at any time since July 19, 2017.

(n) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., November 4, 2020.



Elizabeth M. Tafe
Administrative Law Judge

[33] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID–19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if Respondent customarily communicates with its employees by electronic means.

If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with the International Association of Machinists and Aerospace Workers, AFL-CIO (the Union) as the exclusive collective-bargaining representative of our employees in the following unit:

All full-time and part-time technicians I, technicians II, lead technicians, counselors, therapists, nutritionist/spiritual advisors, and front desk/receptionists employed by Tropical Wellness Center, LLC.

WE WILL NOT fail and refuse to maintain in effect agreed-to terms and conditions of employment pursuant to collectively bargained agreements, without the Union's consent.

WE WILL NOT fail and refuse to remit employees' union dues that you authorized to be deducted from your payroll, without the Union's consent.

WE WILL NOT fail and refuse to make monthly pension payments to IAM Labor Management Pension Fun, IAM National Pension (IAM Pension Fund) pursuant to the collective-bargaining agreement, without the Union's consent

WE WILL NOT lay you off because you joined and assisted any union, engaged in protected concerted activity, or in order to discourage your union activity.

WE WILL NOT fail and refuse to promptly furnish information requested by the Union that is relevant and necessary to the Union's role as your representative.

WE WILL NOT fail and refuse to meet and confer with the Union, upon request, regarding grievances filed pursuant to the collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize the Union as your exclusive collective bargaining representative, and, upon request, bargain with the Union concerning your wages, hours, and other terms and conditions of employment.

WE WILL maintain in effect the terms of collectively bargained agreements with the Union concerning your terms and conditions of employment, unless the Union consents to proposed changes.

WE WILL furnish to the Union the information requested on November 4, 2015 and WE WILL furnish information requested by the Union that is relevant and necessary to its role as your collective bargaining representative.

WE WILL remit to the Union on your behalf the Union dues owed since July 19, 2015, without seeking recoupment from employees.

WE WILL remit to the IAM Pension Fund, pension payments owed for bargaining unit employees from July 19, 2015.

WE WILL rescind the layoffs of employees Travis Beaver, Greg Dombal, Joanne James, Jamie Kollock, Alice Kwolek, Teresa Lee, Trinity Phillips, and Heather Moore Strobe, and other unit employees laid off on March 4, 2016, if any.

WE WILL, within 14 days from the date of the Board's Order, offer Travis Beaver, Greg Dombal, Joanne James, Jamie Kollock, Alice Kwolek, Teresa Lee, Trinity Phillips, and Heather Moore Strobe, and other unit employees laid off on March 4, 2016, if any, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make whole Travis Beaver, Greg Dombal, Joanne James, Jamie Kollock, Alice Kwolek, Teresa Lee, Trinity Phillips, and Heather Moore Strobe, and other unit employees laid off on March 4, 2016, if any, for any loss of earnings and other benefits suffered as a result of the unlawful layoffs.

WE WILL compensate Travis Beaver, Greg Dombal, Joanne James, Jamie Kollock, Alice Kwolek, Teresa Lee, Trinity Phillips, and Heather Moore Strobe, and other unit employees laid off on March 4, 2016, if any, for their search-for-work and interim expenses regardless of whether those expenses exceed their interim earnings.

WE WILL compensate Travis Beaver, Greg Dombal, Joanne James, Jamie Kollock, Alice Kwolek, Teresa Lee, Trinity Phillips, and Heather Moore Strobe, and other unit employees laid off on March 4, 2016, if any, for the adverse consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director of Region 12, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful layoffs, and WE WILL, within 3 days thereafter, notify Travis Beaver, Greg Dombal, Joanne James, Jamie Kollock, Alice Kwolek, Teresa Lee, Trinity Phillips, and Heather Moore Strobe, and other unit employees laid off on March 4, 2016, if any, in writing that this has been done and that the layoffs will not be used against them in any way.

WE WILL, preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

Tropical Wellness Center, LLC

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov

South Trust Plaza, 201 East Kennedy Boulevard, Suite 300, Tampa, FL 33602-5824
(813) 228-2641, Hours: 8:00 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/12-CA-167884 using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER (813) 228-2641.